Supreme Court, U.S.
FILED
MAR 3 1993
OFFICE OF THE CLERK

No. ——

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

---

JON EDELMAN,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

JOHN G. KESTER *
GERALD A. FEFFER
THOMAS G. HENTOFF
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5069
*Attorneys for Petitioner*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTION PRESENTED

When the judge during a federal criminal trial meets *ex parte* in secret with the prosecuting attorney to review prosecution strategy and plan rulings, may the reviewing appeliate court hold this to be harmless error without requiring a full record of what happened?

## LIST OF PARTIES

The parties to the proceeding in the Court of Appeals were petitioner, respondent, and Bernhard Fred Manko.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS, RULE AND CODE PROVISIONS INVOLVED | 2 |
| STATEMENT | 2 |
| A. The *Ex Parte* Proceeding in the District Court | 2 |
| B. The Affirmance by the Court of Appeals | 5 |
| REASONS FOR GRANTING THE WRIT | 7 |
| I. THE SECOND CIRCUIT'S AFFIRMANCE WITHOUT A FULL RECORD OF WHAT HAPPENED *EX PARTE* CONFLICTS WITH DECISIONS OF THE FIRST, SIXTH, NINTH AND ELEVENTH CIRCUITS AND OF STATE SUPREME COURTS | 8 |
| A. Other Circuits and State Supreme Courts Hold That Due Process Requires a Complete Record for Review | 8 |
| B. Other Circuits Place a "Heavy" Burden on the Government To Demonstrate That an *Ex Parte* Contact Was Harmless | 12 |
| C. The Decision Rejects This Court's Reasoning in *Rushen* v. *Spain* | 13 |
| II. THE SECOND CIRCUIT'S PERMITTING A JUDGE TO MEET *EX PARTE* TO PLAN CLOSING ARGUMENT WITH THE PROSECUTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND STATES AND OF THIS COURT | 14 |

TABLE OF CONTENTS—Continued


| | Page |
|---|---|
| A. The Sixth Circuit and Other Circuits and States Reverse for Far Less Than a Strategy Session Between Judge and Prosecutor | 15 |
| B. Discussing Prosecution Strategy Is Not an "Extraordinary Circumstance" Justifying Exclusion of the Defendant | 17 |
| C. Petitioner's Right To Be Present at a "Critical Stage" Was Violated | 19 |
| III. SECRET ASSISTANCE BY A JUDGE TO A PROSECUTOR DENIES DUE PROCESS OF LAW | 20 |
| IV. THE CASE IS IMPORTANT | 24 |
| CONCLUSION | 26 |
| APPENDICES | |
| A. Opinion of the Court of Appeals (Oct. 9, 1992) | 1a |
| B. Order of the Court of Appeals (Dec. 4, 1992) | 25a |
| C. Judgment of the District Court (Dec. 2, 1991) | 27a |
| D. Sealed transcript of some portion of *ex parte* meeting (Jan. 29, 1991) | 29a |
| E. Proceedings, District Court (Jan. 30, 1991) | 31a |
| F. Proceedings, District Court (Jan. 31, 1991) | 33a |
| G. Letter of United States Attorney consenting to unsealing (Feb. 28, 1991) | 37a |
| H. Constitutional Provisions, Rule, and Code Provisions Involved | 38a |

## TABLE OF AUTHORITIES

*Cases:* Page

*Application of Storer Communications, Inc.*, 828 F.2d 330 (6th Cir. 1987) ..... 20
*Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991) ..... 20
*Brady* v. *Maryland*, 373 U.S. 83 (1963) ..... 15
*DeGrave* v. *United States*, 820 F.2d 870 (7th Cir. 1987) ..... 14
*Faretta* v. *California*, 422 U.S. 806 (1975) ..... 19
*Fillippon* v. *Abion Vein Slate Co.*, 250 U.S. 76 (1919) ..... 20
*Gerstein* v. *Pugh*, 420 U.S. 103 (1975) ..... 23
*Grieco* v. *Meachum*, 533 F.2d 713 (1st Cir.), *cert. denied sub nom. Cassesso* v. *Meachum*, 429 U.S. 858 (1976) ..... 10, 11
*Guenther* v. *Commissioner*, 889 F.2d 882 (9th Cir. 1989) ..... 9, 10
*Guenther* v. *Commissioner*, 939 F.2d 758 (9th Cir. 1991) ..... 10, 11
*Haller* v. *Robbins*, 409 F.2d 857 (1st Cir. 1969) ..... 12, 15, 16, 22, 24
*Herring* v. *New York*, 422 U.S. 853 (1975) ..... 20
*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951) ..... 23
*LaChappelle* v. *Moran*, 699 F.2d 560 (1st Cir. 1983) ..... 17
*Locklear* v. *Harvey*, 273 S.C. 58, 254 S.E.2d 293 (1979) ..... 17
*Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980) ..... 23
*McKenzie* v. *Risley*, 915 F.2d 1396 (9th Cir. 1990) ..... 24
*Mempa* v. *Rhay*, 389 U.S. 128 (1967) ..... 20
*In re Murchison*, 349 U.S. 133 (1955) ..... 23
*Offutt* v. *United States*, 348 U.S. 11 (1954) ..... 22
*In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990), *cert. denied sub nom. General Elec. Co.* v. *Knight*, 111 S.Ct. 1584 (1991) ..... 9
*In re Paradyne Corp.*, 803 F.2d 604 (11th Cir. 1986) ..... 10
*Penthouse Int'l, Ltd.* v. *Dominion Fed. Sav. & Loan Ass'n*, 855 F.2d 963 (2d Circ. 1988), *cert. denied*, 490 U.S. 1005 (1989) ..... 25

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *People* v. *Loftis*, 55 Ill. App. 3d 456, 370 N.E.2d 1160 (1977) | 21 |
| *Polizzi* v. *United States*, 550 F.2d 1133 (9th Cir. 1976) | 16 |
| *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) | 22 |
| *Remmer* v. *United States*, 347 U.S. 227 (1954) | 14 |
| *Rogers* v. *United States*, 422 U.S. 35 (1975) | 19 |
| *Rose* v. *State*, 601 So. 2d 1181 (Fla. 1992) | 16, 17, 23 |
| *Rushen* v. *Spain*, 464 U.S. 114 (1983) | 13, 14, 19 |
| *Sanborn* v. *Commonwealth*, 754 S.W.2d 534 (Ky. 1988) | 16 |
| *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959) | 11 |
| *Shields* v. *United States*, 273 U.S. 583 (1927) | 20 |
| *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934) | 19 |
| *State* v. *Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988) | 16 |
| *State* v. *Crawford*, 99 Idaho 87, 577 P.2d 1135 (1978) | 16 |
| *State* v. *McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991) | 11, 12 |
| *State* v. *McGuinn*, 268 S.C. 112, 232 S.E.2d 229 (1977) | 11, 21 |
| *State* v. *Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979) | 17 |
| *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977) | 15 |
| *Tumey* v. *Ohio*, 273 U.S. 510 (1927) | 23 |
| *United States* v. *Adams*, 785 F.2d 917 (11th Cir.), *cert. denied*, 479 U.S. 1009 (1986) | 12, 17, 21 |
| *United States* v. *Arroyo-Angulo*, 580 F.2d 1137 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978) | 24-25 |
| *United States* v. *Ash*, 413 U.S. 300 (1973) | 21 |
| *United States* v. *Cianfrani*, 573 F.2d 835 (3d Cir. 1978) | 22 |
| *United States* v. *Cronic*, 466 U.S. 648 (1984) | 20, 21 |
| *United States* v. *Earley*, 746 F.2d 412 (8th Cir. 1984), *cert. denied*, 472 U.S. 1010 (1985) | 21, 23 |
| *United States* v. *Hackett*, 638 F.2d 1179 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) | 9, 12, 13 |

TABLE OF AUTHORITIES—Continued


Page

*United States* v. *Ianniello*, 866 F.2d 540 (2d Cir. 1989) ..... 14

*United States* v. *Martinez*, 667 F.2d 886 (10th Cir. 1981), *cert. denied*, 456 U.S. 1008 (1982) ..... 18

*United States* v. *Minsky*, 963 F.2d 870 (6th Cir. 1992) ..... 5, 12, 15, 16, 20, 24

*United States* v. *Persico*, 349 F.2d 6 (2d Cir. 1965) ..... 24

*United States* v. *Schipani*, 362 F.2d 825 (2d Cir.), *vacated*, 385 U.S. 372 (1966) ..... 24

*United States* v. *Stratton*, 649 F.2d 1066 (5th Cir. Unit A 1981) ..... 20

*United States* v. *Swanson*, 943 F.2d 1070 (9th Cir. 1991) ..... 20

*United States* v. *Swindall*, 971 F.2d 1531 (11th Cir. 1992) ..... 24

*United States* v. *Thompson*, 827 F.2d 1254 (9th Cir. 1987) ..... 10, 21

*United States* v. *Walker*, 920 F.2d 513 (8th Cir. 1990) ..... 24

*United States* v. *Walsh*, 700 F.2d 846 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983) ..... 5, 13

*Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) ..... 23

*Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) ..... 21

*Constitutional Provisions:*

U.S. Constitution, Fifth Amendment ..... 2, 5, 9, 19, 38a
Sixth Amendment ..... 2, 5, 15, 19, 21, 38a
Fourteenth Amendment ..... 12, 16, 17

*Statutes:*

18 U.S.C. § 371 ..... 2
18 U.S.C. § 3500 ..... 15
26 U.S.C. § 7206 ..... 2
28 U.S.C. § 455 ..... 22
28 U.S.C. § 1254 ..... 2

TABLE OF AUTHORITIES—Continued

*Rules:* Page

Federal Rules of Criminal Procedure, Rule 43....2, 19, 39a

*Miscellaneous:*

AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT (1990) .....17, 22, 41a

AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) .....22, 43a

AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT (1992) .....22, 44a

JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES (1992) .....22, 40a

Lubet, *Ex Parte Communications: An Issue in Judicial Conduct*, 74 JUDICATURE 96 (1990) ..... 19, 24

8B J. MOORE, MOORE'S FEDERAL PRACTICE (1983).. 21

U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL (1992) ..... 22

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

---

No. ———

---

JON EDELMAN,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case October 9, 1992.

## OPINIONS BELOW

No opinion was rendered by the District Court. Pertinent portions of the transcript of proceedings in that court appear in the appendix at A. 29a-36a.[1] The opinion of the Court of Appeals is reported at 979 F.2d 900 and is reproduced in the appendix at A. 1a. The pertinent portion of that opinion is at A. 16a-19a.

---

[1] References to "A." are to the appendices to this petition.

## JURISDICTION

The judgment of the District Court was entered December 2, 1991. A. 27a. The opinion and judgment of the Court of Appeals were entered October 9, 1992. A. 1a. A timely petition for rehearing was filed October 23, 1992 and was denied by the Court of Appeals December 4, 1992. A. 25a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, RULE, AND CODE PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States, Rule 43 of the Federal Rules of Criminal Procedure and pertinent provisions of the Code of Conduct for United States Judges, Code of Judicial Conduct, Model Code of Professional Responsibility, and Model Rules of Professional Conduct are reproduced at A. 38a-45a.

## STATEMENT

Petitioner was tried and convicted in the United States District Court for the Southern District of New York for making and aiding and abetting false tax returns and for conspiracy to commit tax offenses.[2]

### A. The *Ex Parte* Proceeding in the District Court.

Near the end of the trial, the prosecuting attorney went secretly to meet the judge outside the courtroom, without the knowledge of defense attorneys. What exactly transpired at that *ex parte* meeting—which the judge directed should be kept secret—is still not known. No affidavit about it was submitted by the prosecution, and the judge never offered any explanation or description of the meeting at all. A portion of the meeting was transcribed, but the sealed partial transcript was not disclosed until weeks after the trial. A document or documents that changed hands between the prosecutor and the

[2] 26 U.S.C. § 7206 and 18 U.S.C. § 371.

judge were never disclosed or made part of the record. What is known, based on the incomplete transcript and incomplete representations made by the prosecutor after the secret meeting was discovered, is the following:

1. After the close of the evidence the government's attorney, without defense counsel's knowledge, went to the judge's robing room with a document or documents. According to a transcribed fragment of the meeting, the prosecutor handed the judge "a document I typed up headed 'Excerpts of testimony.' . . . It's a mockup of a chart I propose to use in my rebuttal summation." A. 29a, *infra*. The prosecutor in the transcribed portion explained that:

> "*I bring this to you* ex parte *because I didn't want to let the defense know* at this time before they sum up exactly *what I am proposing to do in my rebuttal* and I did want to apprise the court that I am planning on doing this so that your Honor could allot whatever time is necessary . . . should there be objections to this."

A. 29a-30a (emphasis supplied).

2. The judge responded, again in the transcribed portion:

> "THE COURT: *No, I don't think you should disclose it.* What I will do is *I will check the places that you expect to use* quotations or summations of testimony with the record so I will be in a position to rule if there are objections to your use."

A. 30a (emphasis supplied).

3. The document or documents that the prosecutor submitted and the judge retained were not marked and are not in the record. The transcript of the secret meeting did not purport to be complete, and obviously was not. The judge ordered that the transcribed portion of the *ex parte* meeting be sealed and not disclosed to defense counsel.

4. When the transcript of that day's proceedings in open court was provided by the court reporter, petitioner's counsel noticed that sequentially numbered pages were missing and sealed. He inquired, and was told by the government counsel that there had been an *ex parte* proceeding. Petitioner's counsel requested that any transcript of proceedings be provided to him. The court replied "No," and that "You will see it as soon as you are finished." A. 31a.

5. After the defense had closed, the prosecution provided to the defense certain charts that the prosecution said it would use in rebuttal summation. These included blowups of more than two dozen paraphrases of the testimony. Petitioner's counsel objected that there was insufficient time to review the charts for accuracy. Petitioner's counsel also objected that

> "It is unfair and incorrect procedure in that the court apparently heard an application for leave to do this ex parte, on Tuesday morning, 12/29, even before defense summation commenced, and while the prosecution summation was under way, and gave an advisory opinion."

A. 34a. The court replied, "Counsel, if you knew what the record was, you wouldn't be making these statements . . . ." *Id.* But the court still refused to provide to defense counsel the sealed pages from the *ex parte* meeting, and ruled that "[w]e'll leave it until after the rebuttal is completed and the jury has gone home . . . ." A. 35a. The jury returned a verdict convicting defendants on all counts, but the court continued to deny petitioner's request to see the sealed pages.

6. A month after the verdict, the United States Attorney advised the District Court that the government now consented to unsealing the two pages of partial transcript taken during the *ex parte* meeting. A. 37a. The court then allowed the sealed pages to be made available to petitioner.

**B. The Affirmance by the Court of Appeals.**

Petitioner appealed, arguing that the District Court's secret *ex parte* meeting to plan prosecution strategy with the prosecutor violated the Fifth and Sixth Amendments, denying due process as well as his right to be present, at least through counsel, at all critical stages of a criminal trial. Petitioner pointed out that the judge had never offered any explanation or description of what had occurred, and that whatever documents the prosecutor had handed the judge had not been disclosed in the record. The record also lacked copies of the charts the prosecutor later used. At oral argument, when the Court of Appeals called it "incomprehensible" that the government had not "show[n] it to your adversary and let[] them make whatever argument they wanted to make at that juncture," the government attorney responded that "I clearly should have done that." Tr., U.S.C.A., at 30.

The Second Circuit, in the four pages of its opinion pertinent to this petition, observed both that the conduct of judge and the prosecutor had been "highly improper" and "unnecessary"—but that this was no reason to reverse. The court "note[d] at the outset our inability to fathom why the prosecutor would jeopardize a four month trial" with a meeting the court said was "improper and unnecessary" and "highly improper." A. 17a, 18a, 19a. It acknowledged cases holding that *ex parte* proceedings in criminal trials "should not be conducted except in extraordinary circumstances," [3] and concluded that "[n]o such extraordinary circumstances are present here." A. 17a. On the contrary, it said,

> "the prosecution initiated this *ex parte* proceeding in a blatant attempt to win a tactical advantage, to get a 'leg up.' Unhappily, the district court went along with the prosecution." A. 18a.

---

[3] *E.g.*, *United States* v. *Walsh*, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983); see also *United States* v. *Minsky*, 963 F.2d 870, 874 (6th Cir. 1992).

Nevertheless, the Court of Appeals took no corrective action and did not direct any further inquiry. It did not reverse. It did not even remand for further proceedings to determine the exact facts regarding the *ex parte* meeting.

The Court of Appeals affirmed despite the fact that the government never submitted any affidavit as to the scope of the meeting; and despite the fact that the district judge likewise never made any explanation whatsoever of what had happened, nor of why the transcript had been sealed until long after the trial, and the documents never disclosed. The Second Circuit held that a secret meeting between judge and prosecutor to discuss and plan the prosecution's closing and the judge's rulings—with the judge agreeing to check in advance paraphrases that the prosecution intended to use, and with the *judge directing that the meeting and documents* exchanged there *not be disclosed to defense counsel*—was not a reason for reversal.

Then the Court of Appeals went on to make assumptions that went beyond the incomplete record: that the transcript included all it needed to know,[4] and that the documents handed to the judge had contained the same paraphrases and quotations as charts that the prosecutor later used in rebuttal (which were not in the record on appeal, either). A. 16a, 19a.[5] Again referring to "this four month trial," A. 19a, the Court of Appeals concluded that "even if the conference did influence the

---

[4] Petitioner pointed out that the pages that were sealed demonstrate on their face that some encounter or exchange of unknown length and content had preceded the transcribed portion, see A. 29a, and neither the government nor the judge ever claimed they were complete.

[5] Whatever documents the prosecutor handed to the judge during their *ex parte* meeting were never disclosed or made a part of the record. The charts, which the Court of Appeals called a "chart" said were "clearly accurate," A. 19a, were not in the record, either, so the Court of Appeals had never seen them. (In fact the government conceded that the charts contained errors. A. 36a.)

judge's decision to allow the chart, . . . we doubt that this chart [which was not in the record] . . . played even a minimal role in influencing the jury verdict." *Id.* Rehearing was denied without opinion. A. 25a.

## REASONS FOR GRANTING THE WRIT

A circuit that is one of the frequent venues for federal criminal prosecutions has tossed aside the basic fair-trial guarantees of presence, public trial, and even-handedness. All were violated, intentionally, in about as flagrant a manner as could be imagined. This holding comes a few weeks after one by the Sixth Circuit (which the Court of Appeals chose to ignore in silence) in which the Sixth Circuit held that an *ex parte* conference between judge and prosecutor that was far less significant, and not secret at all, was *per se* reversible error.

The Second Circuit's holding tells the legal community that government attorneys and judges can secretly discuss and rehearse strategy and rulings together during a trial, that the judge can instruct the prosecutor to keep it secret, and that on review this will be ignored as harmless error—even when there is no complete record of what occurred. The Court of Appeals' failure at least to remand to require that an adequate record be made not only defies logic: it is in flat conflict with decisions in other circuits and state supreme courts that hold that when an *ex parte* contact occurs, the reviewing court must have a full record to determine what happened, before it can decide, and that the burden to prove what happened rests on the government. The court's holding also conflicts with decisions of other circuits and state supreme courts that in criminal trials *ex parte* proceedings unless there is dire necessity are intolerable, and with this Court's holdings that due process of law requires at a minimum a public trial conducted by an impartial judge.

## I. THE SECOND CIRCUIT'S AFFIRMANCE WITHOUT A FULL RECORD OF WHAT HAPPENED *EX PARTE* CONFLICTS WITH DECISIONS OF THE FIRST, SIXTH, NINTH AND ELEVENTH CIRCUITS AND OF STATE SUPREME COURTS.

*Ex parte* contacts between judge and prosecutor—particularly secret ones—are not a trival matter, especially in a federal felony prosecution. It is well established in many circuits, and state supreme courts applying the United States Constitution have held also, that a reviewing court will not simply assume that what occurred in an *ex parte* meeting was harmless. In fact, the burden of establishing both (a) what occurred and (b) that it was harmless, has always until now been placed on the government. It has been called a "heavy" burden.

### A. Other Circuits and State Supreme Courts Hold That Due Process Requires a Complete Record for Review.

The Court of Appeals, faced with a gross and undeniable instance of prosecutorial and judicial misconduct at a criminal trial, misconduct which the court itself called "highly improper," did not require an adequate record to be made. Instead, it delivered a scolding and dismissed the whole thing, based on nothing but speculation.

The Second Circuit here had no record except a partial transcript of what occurred when the district judge and the Assistant United States Attorney met. That fragmentary record itself disclosed that a document changed hands; but the very document, which the judge apparently retained, was never disclosed or made part of the record, and what became of it was never revealed. The Court of Appeals assumed that the document was limited to, and identical with, the charts used at closing; it further assumed that the charts, which paraphrased testimony, were not consequential—but the charts were not in the record, either.

Before a reviewing court can decide that the error was harmless, it must know exactly what occurred. "We

cannot affirm what we cannot review . . . ." *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 859 (3d Cir. 1990), *cert. denied sub nom. General Elec. Co.* v. *Knight*, 111 S. Ct. 1584 (1991). Here, the Second Circuit could only guess. The full scope of what occurred between judge and prosecutor at the *ex parte* meeting, the record simply does not show. The transcript of what was said is incomplete on its face. A. 29a. There were no affidavits whatsoever by the participants as to what happened. Nor was there any explanation by the judge.[6] Neither were the document or documents that the government attorney handed to the judge made part of the record. The Second Circuit should have reversed outright based on what this record already discloses. But at the very least, it should have remanded to require that a complete record be made.

The Second Circuit went beyond holding that the record here showed only harmless error. Rather, its holding is that harmlessness can be presumed, without a full record, by the reviewing appellate court. In effect, it concluded that secret *ex parte* meetings between a federal judge and a federal prosecuting attorney during a trial are to be assumed harmless—and that no record will be required to be made that might upset that comfortable assumption.

What other circuits have held is wholly to the contrary.

The Ninth Circuit requires exactly what the Second Circuit rejected. In *Guenther* v. *Commissioner*, 889 F.2d 882 (9th Cir. 1989), a civil tax fraud case (not even a criminal prosecution) in which it was learned that government counsel had delivered a memorandum *ex parte* to the court, the Ninth Circuit, citing the Fifth Amendment's

---

[6] *Cf. United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). Also, the record does not contain the order of the court that sealed the transcript, nor the order that unsealed it. The whole nature of the sealing process in this case, and the judge's orders to the court reporter, are unexplained.

due process clause, remanded and directed an evidentiary hearing because

> "[s]*ince the memorandum does not form a part of the record, we do not have sufficient knowledge* to enable us to determine whether taxpayers might have been prejudiced."

889 F.2d at 884 (emphasis supplied). The court held that "[w]e must remand, therefore, . . . with instructions to conduct an evidentiary hearing." *Id.* at 885.[7] As the Ninth Circuit explained in another case, "if we are to review the district judge's decision [made after an *ex* parte conference with the prosecutor], *we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts . . . .*" *United States* v. *Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987) (emphasis supplied).

The Eleventh Circuit follows the same rule. In *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986), defendants sought the extraordinary relief of mandamus to compel a district judge to release "transcripts of an *ex parte* presentation made to the district court by the government in support of its motion to disqualify" defense counsel. The Eleventh Circuit held that "to ameliorate any unfair advantage—or the appearance thereof—that might have resulted from the *ex parte* presentation at issue here, the transcript must be made available to petitioners." *Id.*, 803 F.2d at 612.

Similarly, in *Grieco* v. *Meachum*, 533 F.2d 713, 719 (1st Cir.), *cert. denied sub nom. Cassesso* v. *Meachum*, 429 U.S. 858 (1976), an evidentiary hearing was held on *habeas corpus* when it was learned that the prosecuting

---

[7] Remand demonstrated that the hearing was not an empty gesture. After a complete record had been made, the Ninth Circuit reversed, explaining that "[b]efore the remand, we were unable to assess any prejudice . . . ." *Guenther* v. *Commissioner*, 939 F.2d 758, 761 (9th Cir. 1991).

attorney in a state-court trial had furnished memoranda to the judge without giving copies to defense counsel. The First Circuit held such *ex parte* submission of documents an action "meriting censure," and affirmed only because the hearing resulted in a record that established waiver by defense counsel's knowing acquiescence in the *ex parte* practice. 533 F.2d at 719.

The Supreme Court of South Carolina followed the same due-process rule in *State* v. *McGuinn*, 268 S.C. 112, 117, 232 S.E.2d 229, 231 (1977), holding that because an *ex parte* discussion between judge and prosecutor had been off the record, "this Court has no way of knowing whether the rights of the appellant were prejudiced and, accordingly, we remand to the lower court for the purpose of resentencing."[8] *Accord*, *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 225 (D.C. Cir. 1959) (ordering hearing to determine nature of *ex parte* communications in administrative proceeding).

Three times in the space of four pages the Second Circuit here referred to petitioner's having been a "four month trial." A. 16a, 17a, 19a. Is one to infer that if the prosecutor and judge had met secretly during a two-week trial, the constitutional rule would have been different? Even if the length of the trial matters, as it seems to have to the Second Circuit, the Court of Appeals without upsetting the conviction could have remanded for an evidentiary hearing or taken other appropriate steps to find out the full extent of, and exactly what, happened. A remand for such purpose is not a reversal. And if after remand the record did not confirm the Court of Appeals' speculation of harmlessness, then reversal, even of a four-month trial, would be called for. *Guenther* v. *Commissioner*, *supra*. After all, it was not petitioner who caused the "highly improper" intentional conduct of

---

[8] See also *State* v. *McCarver*, 329 N.C. 259, 261, 404 S.E.2d 821, 822 (1991) ("there was no record made of the conversations at the bench and we are unable to determine whether the error was harmless . . . .") (applying state confrontation clause).

judge and prosecutor that created this extraordinary and unseemly situation.

### B. Other Circuits Place a "Heavy" Burden on the Government To Demonstrate That an *Ex Parte* Contact Was Harmless.

In other circuits, when any *ex parte* discussion between judge and prosecutor has occurred in a criminal trial, *the burden is placed on the government* to establish that what occurred was harmless. The leading and much-cited case is the First Circuit's decision in *Haller* v. *Robbins*, 409 F.2d 857 (1st Cir. 1969), which held this to be so fundamental a part of due process that it also applied to state criminal procedure under the Fourteenth Amendment. The First Circuit admonished that

> "the burden of proving lack of prejudice is on the state, and it is a heavy one. . . . The burden of excluding prejudice . . . is on the state . . . ."

409 F.2d at 860, quoted and applied most recently in *United States* v. *Minsky*, 963 F.2d 870, 874 (6th Cir. 1992).

The same rule applies in the Ninth Circuit. In *United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981), the Ninth Circuit reiterated that "the burden of showing no prejudice" is on the government; the court held that the burden had been met in that case—but only because "both the judge and the prosecutor gave accounts fully explaining what transpired in the meeting." 638 F.2d at 1188.[9]

---

[9] See also *State* v. *McCarver*, *supra*, 329 N.C. at 261, 404 S.E.2d at 822 ("[u]nless the State can show that this denial of the defendant's right to be present is harmless beyond a reasonable doubt there must be a new trial"). In other federal cases convictions have been affirmed in spite of an *ex parte* violation—not where, as here, prosecution strategy had been discussed, but rather where the *ex parte* contact was demonstrated by the government on a complete record to have been so plainly trivial that it did not affect the fairness of the trial. See, *e.g.*, *United States* v. *Adams*, 785 F.2d 917, 920 (11th Cir.) (affirming conviction, noting that "the *entire* conference

Here, however, the record is incomplete; the government on this record could not possibly meet its burden. The Court of Appeals did not require it to do so. Instead of following the law in other circuits and placing a "heavy" burden on the government, the Second Circuit placed no burden on the government at all. It placed the burden on the defendant, instead. A. 18a. The Second Circuit's rejection of federal law applied elsewhere should be reviewed by this Court.

### C. The Decision Rejects This Court's Reasoning in *Rushen* v. *Spain*.

*Rushen* v. *Spain*, 464 U.S. 114 (1983), was a case in which the trial judge had had *ex parte* meetings, not with a prosecuting attorney, but with a juror who discovered in the course of a lengthy trial that she had been acquainted with the victim of an unrelated crime. This Court recognized the "day-to-day realities of courtroom life" by which a juror may "have occasion to speak to the trial judge about something." 464 U.S. at 118-19. This Court held that the prejudicial effect, if any, of the communication "can normally be determined by a post-trial hearing," and that "[t]he post-trial hearing in this case created more than adequate support" for concluding there had been no prejudice. *Id.* at 119-20; see also *id.* at 126, 128 (Stevens, J., concurring) (there was "a meaningful hearing . . . in which the substance of the *ex parte* conversations . . . could be established," and "no contention that the post-trial hearing was inadequate").

The Second Circuit's decision here is irreconcilable with the reasoning of *Rushen* v. *Spain* for at least two reasons:

---

was transcribed") (emphasis supplied), *cert. denied*, 479 U.S. 1009 (1986); *United States* v. *Walsh*, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983) (emphasizing that "[h]ere a verbatim transcript of the *ex parte* proceeding was made, sealed, and forwarded to the Court as part of the record"); *United States* v. *Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980) ("both the judge and the prosecutor gave accounts fully explaining what transpired in the meeting").

1. Here there was no hearing at all, meaningful or otherwise. What partial transcript there was, was kept under seal by the trial court until long after the trial, when the government finally agreed to release it. A. 35a, 37a. The document(s) handed to the trial judge, or their disposition, have not been disclosed to this day. Nevertheless, the Second Circuit affirmed on a theory that the document(s) probably resembled the charts (which it did not see), and that the whole thing must have been harmless. A. 19a.

2. Although an occasional *ex parte* exchange between a juror and judge may be one of the "day-to-day realities of courtroom life," 464 U.S. at 119, an *ex parte* meeting of judge and prosecuting attorney to discuss future events in a criminal trial certainly is not. A judge's meeting with an unsophisticated and presumably neutral juror is hardly the same as meeting with an attorney for the government who is engaged, as the Second Circuit recognized, "in a blatant attempt to win a tactical advantage, to get a 'leg up.'" A. 18a.[10]

## II. THE SECOND CIRCUIT'S PERMITTING A JUDGE TO MEET *EX PARTE* TO PLAN CLOSING ARGUMENT WITH THE PROSECUTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND STATES AND OF THIS COURT.

Even on the incomplete record that exists now, swift reversal in most circuits and many states would follow without needing to know anything more.

---

[10] For cases ordering evidentiary hearings to enable review of *ex parte* communications between judge and juror, see, *e.g.*, *Remmer* v. *United States*, 347 U.S. 227, 229-30 (1954) ("the burden rests heavily on the Government to establish . . . that such contact with the juror was harmless"); *United States* v. *Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) ("the facts must be carefully ascertained before a decision is made on whether a new trial is required"); *cf. DeGrave* v. *United States*, 820 F.2d 870, 872 (7th Cir. 1987) (hearing required for *ex parte* contact of jurors and court reporter).

### A. The Sixth Circuit and Other Circuits and States Reverse for Far Less Than a Strategy Session Between Judge and Prosecutor.

Petitioner's conviction was affirmed because he was tried in the Second Circuit instead of the Sixth. In *United States* v. *Minsky*, 963 F.2d 870 (6th Cir. 1992), the district judge—not secretly, but in plain view of all parties and counsel—"held a sidebar conference with *only* the prosecutors present" to inquire whether the defense had been informed of certain statements that were possibly Jencks Act or *Brady* material.[11] 963 F.2d at 872-73 (emphasis in original). Just ten months ago the Sixth Circuit in a forceful opinion reversed. It reiterated that *ex parte* proceedings "can only be justified and allowed by compelling state interests." 963 F.2d at 874, quoting *In re Taylor*, 567 F.2d 1183, 1187-88 (2d Cir. 1977). It added, quoting *Haller* v. *Robbins*, *supra*, that "the burden of proving lack of prejudice is on the government and it is a heavy one." It cited cases from other circuits to the same effect, and held that "the *ex parte* sidebar conference violated Minsky's right to a fair trial and was a Sixth Amendment violation." 963 F.2d at 874, quoting in part 409 F.2d 860.

There is no way that the Second Circuit decision can be reconciled with *Minsky*.[12] *Minsky* was reversed because the district court there had held an *ex parte* bench conference with the prosecutor at which, as here, the subject under discussion was the government's conduct of the trial—even though it was not done in secret and was a far lesser infraction of the defendant's rights.

The Second Circuit opinion here, indeed, acknowledges that the *ex parte* meeting was not only "highly improper" but "wholly unnecessary." A. 17a, 19a. And worse than

---

[11] 18 U.S.C. § 3500; *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[12] Petitioner strenuously argued the *Minsky* decision to the Court of Appeals, both in the initial briefs and on petition for rehearing. The Second Circuit elected never to mention it.

*Minsky*—in which the *ex parte* conference at least took place in full view of all—and in which a full transcript was made and was part of the appellate record—here by contrast the meeting occurred in secret, and was discovered only when counsel noticed pages missing from the transcript. Even then, the district judge here uttered not a word to explain it, instead offering a mysterious comment to counsel that "if you knew" what happened, counsel might act differently. A 34a. Also unlike *Minsky*, the document that was discussed *ex parte* is not in the record at all, and the transcript that exists is palpably incomplete.

Also in the past year the Supreme Court of Florida applied the due process clause of the Fourteenth Amendment to an *ex parte* communication in a criminal trial and reversed, holding that

> "Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case."

*Rose* v. *State*, 601 So. 2d 1181, 1183 (Fla. 1992). The Supreme Court of Idaho holds the same. *State* v. *Crawford*, 99 Idaho 87, 95, 577 P.2d 1135, 1143 (1978) (due process includes right "to be present at all stages of the trial from arraignment to verdict" if "absence could, under some set of circumstances, be harmful") (quoting *Polizzi* v. *United States*, 550 F.2d 1133, 1137-38 (9th Cir. 1976)). *Accord*, *Sanborn* v. *Commonwealth*, 754 S.W.2d 534, 549 (Ky. 1988) ("*after* trial has commenced . . . *every order requested of the court* is a matter to be addressed in the *presence of opposing counsel*," citing *Heller* v. *Robbins*, *supra*) (emphasis in original).[13]

---

[13] See also *State* v. *Barker*, 227 Neb. 842, 847, 420 N.W.2d 695, 699 (1988) (under state law, invited "ex parte communication . . . reasonably raises a question about the judge's impartiality" and

### B. Discussing Prosecution Strategy Is Not an "Extraordinary Circumstance" Justifying Exclusion of the Defendant.

The Second Circuit paid lip service to the rule observed in most circuits that *ex parte* contacts are tolerated only in "extraordinary circumstances." [14] It acknowledged that "[n]o such extraordinary circumstances are present here." A. 17a. But it forgot the rest of the rule that the other circuits and states follow: that when such an "improper and unnecessary" meeting occurs, reversal follows unless the government sustains the "heavy" burden of establishing harmlessness.

Other courts have held that even *ex parte* conferences occurring for arguably laudable reasons constitute reversible error because of the danger they pose to the appearance of fairness. Thus a state supreme court applying the due process clause, reviewing the incomplete record of an *ex parte* meeting between judge, prosecutor, and crime victim that occurred immediately prior to sentencing, vacated the sentence, explaining that "[w]hile it is unlikely that anything improper was said, it is the *possibility of prejudice* that we are concerned with." *Locklear* v. *Harvey*, 273 S.C. 58, 59, 254 S.E.2d 293 (1979) (emphasis supplied).

The meeting here, besides being unnecessary, was not laudable at all. The government did not even attempt

---

there is "no requirement that a litigant must show a judge's prejudice" from it). State courts have also reversed because *ex parte* communications violate the Code of Judicial Conduct, Canons 2 and 3. See, *e.g.*, *State* v. *Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979); *Rose* v. *State*, *supra*; A. 41a-43a.

[14] Extraordinary circumstances permitting *ex parte* proceedings might arise, for example, when "a juror or witness, having been threatened, wished to speak with the judge privately about the threat." *LaChappelle* v. *Moran*, 699 F.2d 560, 565 (1st Cir. 1983); see also *United States* v. *Adams*, 785 F.2d 917, 920 (11th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

to justify it.[15] And the portion of the *ex parte* conference that was transcribed reinforces and confirms the worst inferences. Not only did the judge discuss strategy with the prosecutor and seal the record. The judge instructed the government attorney not to tell the defendant, A. 30a, which in itself was "obviously improper." *United States* v. *Martinez*, 667 F.2d 886, 890 (10th Cir. 1981), *cert. denied*, 456 U.S. 1008 (1982).[16] The judge then volunteered to prescreen the government's closing:

> "THE COURT: What I will do is I will check the places that you expect to use quotations or summations of testimony with the record so I will be in a position to rule if there are objections to your use.
>
> MR. CLEARY: Thank you, Judge." A. 30a.

As the Court of Appeals here observed:

> "The only purpose for showing the court the precise quotes the government wished to use was to enable the court to review the chart for accuracy before the defense had an opportunity to present any arguments to the court. In short, the prosecution initiated this *ex parte* proceeding in a *blatant attempt to win a tactical advantage*, to get a 'leg up.' *Unhappily, the district court went along with the prosecution.*"

A. 18a (emphasis supplied). The District Court vetted the government's submission in order to be prepared in advance to be in a position to respond to defense counsel's objections as they might arise. The Seventh Circuit judges have pointed out that

> "The knowledge that a judge will rule in a particular way is invaluable information to the lawyer

---

[15] "And hindsight being 20/20, I realize that I shouldn't even have done that." Tr. of oral arg., U.S.C.A., 2d Cir., at 31 (counsel for United States).

[16] That much the transcript discloses. The Assistant United States Attorney in their private meeting told the judge, "I bring this to you ex parte because I didn't want to let the defense know at this time before they sum up . . . ." The judge replied, "*No, I don't think you should disclose it.*" A. 29a-30a (emphasis supplied).

and the client, particularly when the other lawyers and their clients do not share in that information." [17]

The fundamental violation in the District Court's conduct here was doubled because, after committing the initial transgression of holding the secret *ex parte* meeting at all, the court then immediately sealed the partial transcript, for no discernible reason—except to assure that defense counsel would be surprised when the government's preplanned rebuttal chart was sprung on them after they had completed their closing arguments. The error was trebly compounded when, after the defendants learned of the meeting and asked to know what had happened, and protested, the court ordered the partial transcript withheld from them until after "the jury has gone home," A. 35a, indeed, until six weeks after the conclusion of the trial.

### C. Petitioner's Right To Be Present at a "Critical Stage" Was Violated.

The accused has the important right, under the Fifth and Sixth Amendments and Rule 43, Fed. R. Crim. P., to be present at all critical stages of a federal criminal prosecution. See, *e.g.*, *Rushen* v. *Spain*, 464 U.S. 114, 117 (1983) ("right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights"); *Rogers* v. *United States*, 422 U.S. 35 (1975); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) ("[i]t is now accepted . . . that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings . . ."); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-06 (1934). This Court has held that even in a civil case, "the orderly conduct of a trial by jury . . . entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is im-

---

[17] Written Public Censure, Seventh Circuit Judicial Council (1985), quoted in Lubet, *Ex Parte Communications: An Issue in Judicial Conduct*, 74 JUDICATURE 96, 98 (1990).

paneled until it is discharged after rendering the verdict." *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919). And "[i]f this be true in a civil case, *a fortiori* is it true in a criminal case." *Shields* v. *United States*, 273 U.S. 583, 588 (1927).

This Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States* v. *Cronic*, 466 U.S. 648, 659 n.25 (1984) (collecting cases). Discussion of what the prosecutor is to be allowed to show the jury during the last argument the jury hears can hardly be deemed less than a critical stage. See *Herring* v. *New York*, 422 U.S. 853, 862 (1975); *United States* v. *Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (summation is "critical stage"); see also *United States* v. *Minsky*, *supra* (sidebar conference on discovery is "critical stage").[18]

## III. SECRET ASSISTANCE BY A JUDGE TO A PROSECUTOR DENIES DUE PROCESS OF LAW.

In *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991), this Court held that "structural defects in the constitution of the trial mechanism . . . defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial."

---

[18] *Accord, e.g., Application of Storer Communications, Inc.*, 828 F.2d 330, 335 (6th Cir. 1987) ("we do not approve the practice of government counsel in a criminal prosecution approaching the trial judge *ex parte* in any matter related to the pending case"). The defendant (as well as defense counsel) is entitled to be present when "there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceedings." *United States* v. *Stratton*, 649 F.2d 1066, 1080 (5th Cir. Unit A 1981). The right to counsel attaches "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967).

See also *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (plurality opinion) ("[t]he narrow focus of harmless-error analysis is not sensitive to th[e] underlying concern" of even the appearance of official partiality).

A "highly improper" and "wholly unnecessary" *ex parte* proceeding at which a trial judge secretly discusses strategy with the government and offers to check the prosecutor's presentation in advance of possible defense objections, and orders that the proceeding be kept secret, taints a trial and cannot be hypothesized away. In criminal cases, attorneys' "presence is essential because they are the means through which the other rights of the person on trial are secured;" it is "the core purpose of the counsel guarantee" of the Sixth Amendment. *United States* v. *Cronic*, *supra*, 466 U.S. at 653, 654, quoting in part *United States* v. *Ash*, 413 U.S. 300, 309 (1973). "But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States* v. *Cronic*, *supra*, 466 U.S. at 656-57 (footnote omitted).

*Ex parte* meetings between judge and prosecutor in criminal trials "are anathema in our system of justice." *United States* v. *Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1987).[19]

---

[19] See also *United States* v. *Earley*, 746 F.2d 412, 416 (8th Cir. 1984), *cert. denied*, 472 U.S. 1010 (1985), quoting 8B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 43.03[2], at 43-23 (1983):

> "An ex parte communication between a trial court and government counsel '[i]n addition to raising questions of due process . . . involve[s] a breach of legal and judicial ethics. Regardless of the propriety of the court's motives in such a case . . . the practice should be discouraged since it undermines confidence in the impartiality of the court.'"

See also, *e.g.*, *United States* v. *Adams*, 785 F.2d 917, 920 (11th Cir.), *cert. denied*, 479 U.S. 1009 (1986); *People* v. *Loftis*, 55 Ill. App. 3d 456, 467, 370 N.E.2d 1160, 1170 (1977); *State* v. *McGuinn*, *supra*.

> " 'Secret hearings—though they be scrupulously fair in reality—are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.' "

*United States* v. *Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978). When judge and prosecutor meet secretly to discuss the course of an ongoing trial, "the appearance of fairness so essential to public confidence in the system" [20] vanishes. The substance of impartiality is also destroyed. "[N]ot only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure." *Haller* v. *Robbins*, *supra*, 409 F.2d at 859. "[J]ustice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).[21]

Far more than appearance, however, is involved:

---

[20] *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 508 (1984).

[21] The court's conduct here was a plain violation of Canons 2 and 3 of the ABA Code of Judicial Conduct; Canon 3 prohibits even nonsubstantive *ex parte* communications unless "require[d]" and "no party will gain a procedural or tactical advantage" and "all other parties" are "promptly" notified and allowed "opportunity to respond." A. 42a. There also was a violation of Rules 3.5 and 8.4 of the Rules of Professional Conduct, and Disciplinary Rule 7-110 and Ethical Consideration 7-35 of the Code of Professional Responsibility. See A. 43a-45a. The latter Code applies to attorneys of the Department of Justice. U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL § 45.735-1(b) (1992). What happened here also is prohibited by Canons 2 and 3 of the new Code of Conduct for United States Judges adopted by the Judicial Conference September 22, 1992. Canon 3 provides in part that a federal judge should "neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." A. 40a-41a. See also 28 U.S.C. § 455(a) (recusal required in any proceeding in which judge's "impartiality might reasonably be questioned").

> "The Due Process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. . . . The neutrality requirement . . . preserves both the appearance and reality of fairness, 'generating the feeling so important to a popular government, that justice has been done,' *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring) . . . ."

*Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citations omitted). Here the role the judge readily offered to play—reviewing prosecution materials for accuracy, and anticipating defense objections—was one for an attorney for the prosecution. This Court has long held that due process is denied when a judge mixes up the roles of judges and prosecutor. *In re Murchison*, 349 U.S. 133 (1955); see also *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Tumey* v. *Ohio*, 273 U.S. 510 (1927). Even a probable-cause determination requires "the detached judgment of a neutral magistrate." *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975).[22]

---

[22] "We are not here concerned with whether an ex parte communication *actually* prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question." *Rose* v. *State*, *supra*, 601 So. 2d at 1183 (emphasis in original) (reversing for denial of due process). Certainly little comfort could be taken from the district court's conduct of the rest of the trial. The Court of Appeals pointed out "several incidents in the trial that we quite frankly find disturbing." A. 10a. It was "troubled by the court's questioning of [petitioner] Edelman," and admonished that "[i]mpeaching the defendant is the job of the prosecution, not the court." A. 11a. It was also "disturbed by the district court's conduct" during the cross-examination of a government witness, in which the district court made a comment that "endorsed the government's view" and was "unnecessary and prejudicial," and then "repeated the error moments later." A. 13a, 15a, 14a. *Cf. United States* v. *Earley*, 746 F.2d 412, 416 (8th Cir. 1984), *cert. denied*, 472 U.S. 1010 (1985) (referring to the "danger . . . with the 'insidious' nature of a court-prosecutor relationship which would allow such ex parte disclosures").

## IV. THE CASE IS IMPORTANT.

*Ex parte* proceedings are occurring during federal criminal trials with disturbing frequency.[23] See Lubet, *Ex Parte Communications: An Issue in Judicial Conduct*, 74 JUDICATURE 96 (1990). This case is about as extreme a violation as can be imagined, short of outright corruption.

It was bad enough here that the government in a federal felony trial was secretly given "private access to the ear of the court." *Haller* v. *Robbins*, *supra*, 409 F.2d at 859, and that the District Court told the prosecutor to keep the meeting secret. But even more troubling and significant, the reviewing court then looked the other way and affirmed without doing anything to find out the full extent of what had really happened. Other circuits hold most *ex parte* contacts are intolerable; they find out the facts and then if necessary reverse. The Second Circuit instead chants that *ex parte* contacts are intolerable—but then closes its eyes to the facts, and tolerates them.

The Second Circuit's holding here is typical of that circuit's uniquely *laissez-faire* approach to the *ex parte* meetings that apparently occur there regularly as part of the federal criminal trial process. Each time, the Second Circuit typically, as here, delivers a stern lecture, says that this is the last time that it will affirm in the face of such misconduct—and then affirms. Then, when the next *ex parte* violation occurs, the formula is repeated, and the conviction again is affirmed. This has gone on in

---

[23] *E.g.*, for recent federal examples, *United States* v. *Swindall*, 971 F.2d 1531, 1541, 1550 (11th Cir. 1992) (holding *ex parte* argument by prosecutor to judge harmless because counts discussed were dismissed); *United States* v. *Walker*, 920 F.2d 513, 516 (8th Cir. 1990) (*ex parte* viewing of evidence in record prior to sentence; affirmed after judge stated there was no conversation with prosecutor); *McKenzie* v. *Risley*, 915 F.2d 1396, 1398 (9th Cir. 1990) (remanded to require evidentiary hearing when special prosecutor met with judge *ex parte* after trial to discuss fee and "may have" discussed other matters); *United States* v. *Minsky*, *supra*.

the Second Circuit for years. *Compare, e.g., United States* v. *Persico*, 349 F.2d 6, 13 (2d Cir. 1965) ("assure that such procedure is not followed in the future") (affirming), *with United States* v. *Schipani*, 362 F.2d 825, 831 (2d Cir.) ("use of this procedure after the date of *Persico* will call for corrective action") (affirming), *vacated on other grounds*, 385 U.S. 372 (1966), *and with United States* v. *Arroyo-Angulo*, 580 F.2d 1137 (2d Cir.) ("such closed proceedings . . . . are fraught with the potential of abuse and, absent compelling necessity, must be avoided") (affirming), *cert. denied*, 439 U.S. 913 (1978), *and with United States* v. *Walsh*, 700 F.2d 846, 857 (2d Cir.) ("[a]n *ex parte* proceeding should not be conducted except in extraordinary circumstances") (affirming), *cert. denied*, 464 U.S. 825 (1983), *and with Penthouse Int'l, Ltd.* v. *Dominion Fed. Sav. & Loan Ass'n*, 855 F.2d 963, 987 (2d Cir. 1988) (civil case condemning "*ex parte* communications between the district court and only one of the litigants") (reversing on other grounds), *cert. denied*, 490 U.S. 1005 (1989). Prosecutors in the Second Circuit have reason to conclude that the rule there is "watch what we do, not what we say."

The basic procedural guarantees of federal criminal defendants should not vary from one part of the country to another. There are no teeth in formal admonitions against *ex parte* meetings between judge and prosecutor if reviewing courts affirm without requiring at least an affidavit from the government as to what occurred, or an explanation from the judge of the scope of and what transpired at the meeting. The Second Circuit's decision sends a message that not only will federal trial judges not be reversed for conducting "highly improper" *ex parte* meetings, no one in that circuit will even be questioned about them. The lesson to federal prosecuting attorneys and even, unfortunately, to district judges, is obvious.

## CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted.

JOHN G. KESTER *
GERALD A. FEFFER
THOMAS G. HENTOFF
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5069
*Attorneys for Petitioner*

March 3, 1993

* Counsel of Record